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May 21, 1996

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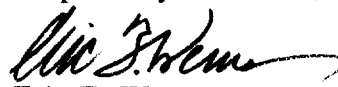
Re: *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996), *summary published*, 61 FED. REG. 9946 (Mar. 12, 1996):
Opposition to Petition for Partial Reconsideration and Immediate Interim Relief

Dear Mr. Secretary:

On behalf of Orion Network Systems, Inc. ("Orion"), and pursuant to Section 1.429(f) and (h) of the Commission's Rules, I enclose herewith for filing an original and eleven (11) copies of Orion's Opposition to Petition for Partial Reconsideration and Immediate Interim Relief in the proceeding noted above.

Please stamp and return to this office the enclosed copy of this filing designated for that purpose. Kindly direct any questions concerning this material to the undersigned.

Respectfully submitted,


Eric T. Werner

Enclosures

cc: Richard H. Shay, Esquire
April McClain-Delaney, Esquire
Thomas J. Keller, Esquire
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

MAY 21 1996

In the Matter of)
)
Amendment to the Commission's) IB Docket No. 95-41
Regulatory Policies Governing)
Domestic Fixed Satellites and)
Separate International Satellite)
Systems)

TO: The Commission

**OPPOSITION OF ORION NETWORK SYSTEMS, INC.,
TO PETITION FOR PARTIAL RECONSIDERATION
AND IMMEDIATE INTERIM RELIEF**

ORION NETWORK SYSTEMS, INC.

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TO: The Commission

**OPPOSITION TO PETITION FOR PARTIAL
RECONSIDERATION AND IMMEDIATE INTERIM RELIEF**

ORION NETWORK SYSTEMS, INC. (hereinafter "Orion"), by its attorneys and pursuant to Section 1.429(f) of the Commission's Rules, 47 C.F.R. § 1.429(f) (1995), hereby submits its Opposition to the Petition for Partial Reconsideration and Immediate Interim Relief ("Petition") filed April 11, 1996, in the above-captioned proceeding^{1/} by COMSAT Corporation and COMSAT International Communications (collectively, "COMSAT").

I. INTRODUCTION

COMSAT's Petition entreats the Commission to revisit its determination in the *DISCO I Order* to defer final action on whether COMSAT may use Intelsat and Inmarsat capacity to provide domestic service in the United States pending the outcome of a further rulemaking intended, in part, specifically to address that question. See *DISCO I Order*, 11 FCC Rcd at 2440 n.89 ("We will discuss issues involving Comsat's provision of domestic service, including MSS, in our forthcoming Notice.").^{2/}

^{1/} *Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, 11 FCC Rcd 2429 (1996), *summary published*, 61 FED. REG. 9946 (Mar. 12, 1996) (*Report and Order* in IB Docket No. 95-41) [*"DISCO I Order"*].

^{2/} Since the filing of COMSAT's Petition, the Commission has formally commenced the further rulemaking to which it alluded in the *DISCO I Order*. See *Amendment of the Commission's*

(continued...)

Claiming to be "similarly-situated" with the array of private U.S. domestic and international satellite service providers affected by the *DISCO I Order*, COMSAT offers two arguments in support of its request, both predicated on the notion that it is the victim of unfair and discriminatory treatment: First, COMSAT contends that the *DISCO I Order* handicaps its ability to compete effectively with private U.S.-licensed operators; second, it contends that such differential treatment conflicts with U.S. policies concerning use of the IGO systems. In essence, COMSAT asks the Commission to prejudge the outcome of the *DISCO II* rulemaking and immediately grant it authority to provide domestic service using Intelsat and Inmarsat capacity.

Insofar as COMSAT's Petition seeks reconsideration of a decision to withhold final action on the subject matter in question, it is procedurally defective under Section 1.429 of the Commission's rules and, accordingly, must be dismissed. Assuming the Commission were to reach the merits, the Petition would nevertheless have to be denied because, despite its fervent claims to the contrary, COMSAT is not similarly-situated with the private satellite providers affected by the *DISCO I Order* and, moreover, COMSAT has failed to undermine in any way the overwhelming considerations, cited by other commenting parties in this proceeding, which weigh against giving COMSAT unrestricted authority to leverage its preferred status as U.S. signatory to Intelsat and Inmarsat to obtain an unfair competitive advantage in the U.S. domestic market.^{3/}

^{2/}(...continued)

Regulatory Policies to Allow Non-U.S.-Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, FCC 96-210, adopted May 9, 1996, released May 14, 1996 (*Notice of Proposed Rule Making* in IB Docket No. 96-111) ("*DISCO II NPRM*").

^{3/} See Comments of Orion Network Systems, Inc. (filed June 8, 1995) at 4 ["Orion Comments"]; Comments of AT&T Corp. (filed June 8, 1995) at 16; and Comments of Columbia Communications Corporation (filed June 8, 1995) at 6.

COMSAT, as a party to these intergovernmental organizations ("IGOs"), enjoys privileges and immunities that distinguish it from private U.S. operators and afford it considerable advantages over its competitors. The Commission need not, and should not, grant COMSAT general authority to enter the domestic market, even on a temporary basis, until it has had the opportunity to examine these issues closely and carefully and to craft a framework that will assure fair competition among all providers. The Commission should hew to its present course and withhold such authority until the *DISCO II* rulemaking has run its course. That rulemaking is the appropriate context within which to consider COMSAT's contentions.

II. DISCUSSION

A. **COMSAT's Petition Must Be Dismissed Because it Improperly Seeks Reconsideration of An Interlocutory Portion of the *DISCO I Order***

On its face, Section 1.429(a) of the Commission's rules affords a right to any interested person to seek reconsideration only "of a final action in a [rulemaking] proceeding" 47 C.F.R. § 1.429(a) (emphasis added). The Commission has stated that this requirement of finality for reconsideration purposes finds a home not merely in the agency's rules but also in the fabric of Section 405 of the Communications Act. *See Luis Prado Martorell*, 6 F.C.C.2d 262, 263 (1967). Accordingly, the Commission has held, the statute affords no right to reconsideration of purely interlocutory orders. *Id.*

Relative to the narrow issue raised by COMSAT, the *DISCO I Order* constitutes the very sort of purely interlocutory order that the Commission has held to be not subject to reconsideration. Specifically, the *DISCO I Order* did not dispose of COMSAT's core issue in any way; rather, it expressly forbore from taking such action in favor of further

proceedings to examine the issue in greater depth. Indeed, it is the Commission's very inaction relative to COMSAT's ability to use Intelsat and Inmarsat capacity on a domestic basis that forms the gravamen of COMSAT's grievance.

Essentially, COMSAT contends that the Commission should have acted, and erred when it instead designated the issue for further rulemaking proceedings.^{4/} However, the Commission has expressly held that Notices of Proposed Rule Making are interlocutory actions outside the scope of Section 1.429(a). *Amendment of Section 73.606(b), Table of Assignments, Television Broadcast Stations (Glenwood Springs, Colorado, and Price and Vernal, Utah)*, 46 Rad. Reg. 2d (P & F) 1284 (Pol. and Rules Div. 1980). Here, the facts evidence not even the Notice itself, but rather a collateral statement in a related Order of an intention to address a particular issue in a forthcoming notice. Clearly such a statement can be no less interlocutory than the Notice itself. Accordingly, COMSAT's Petition should be dismissed as procedurally defective and its request for authority to operate domestically denied.

^{4/} COMSAT's Petition notes that the *DISCO I Notice of Proposed Rule Making* solicited comments concerning whether COMSAT should be permitted entry into the domestic market using the IGOs' capacity. COMSAT maintains that both itself and other parties "had a full opportunity to comment on this issue." Petition at 5 n.11. Thus, COMSAT contends, "there is already a thorough record on this matter, and it is fully ripe for agency action" with regard to the relief COMSAT has requested. *Id.* (emphasis added). This statement tacitly concedes that Commission has not yet given final action on the issue. COMSAT drives the point home even more firmly with its statement that it "expressly agrees that it will modify or adjust its provision of domestic service upon completion of the *DISCO-II* phase of this proceeding to conform to any rules or policies adopted therein." *See id.* at 1 n.3.

B. The Commission's Decision to Defer to Another Rule Making the Question of COMSAT's Authority to Provide Domestic Service Using IGO Capacity Entirely Befitted COMSAT's Unique Status and Comported with the Preponderance of Parties' Comments

Assuming, *arguendo*, that the Commission does not dismiss the Petition on the basis of the procedural defect discussed above, it must nevertheless deny the Petition on the merits. The Commission's treatment of the COMSAT domestic service question in the *DISCO I Order* was entirely proper based on the administrative record before the Commission. In its Petition, COMSAT repeatedly recites the list of activities which the *DISCO I Order* permits private U.S. licensed domestic and international satellite operators now to conduct but which remain unavailable to COMSAT,^{5/} as if the mere fact of that differential treatment establishes impermissible discrimination. However, COMSAT's Petition entirely ignores the underlying characteristics which set COMSAT apart as a *sui generis* entity among U.S. satellite providers, distinguishable from private satellite system operators, and which warrant such special treatment or at least special examination prior to affording it equal treatment.

COMSAT's entire discussion of what it characterizes as the "substantial submissions" on the issue of its use of IGO capacity for domestic service appears in footnote 11 of the Petition where COMSAT states that it "summarized the benefits of allowing it to provide both international and domestic service in its opening comments," and further adds that "[o]ther parties also had a full opportunity to comment on this issue." Petition at 5 n.11. That COMSAT devotes so little attention to the record is hardly surprising in view of the fact

^{5/} See, e.g., Petition at 5-7.

that many "other parties" took full advantage of the opportunity to comment and virtually all of those who did comment on the issue squarely contradicted COMSAT's position.

These parties' comments brought into sharp relief the characteristics which distinguish COMSAT from private satellite operators and highlighted as well the natural and damaging consequences for competition that these characteristics engender. In fact, a number of parties (including Orion) specifically explained that, because of COMSAT's special status as an IGO signatory, the question of whether COMSAT should be permitted to enter the domestic market using IGO capacity presented numerous complex problems that warranted more comprehensive and careful consideration in a proceeding devoted to that purpose.^{6/} For example, Orion stated that:

As U.S. signatory to INTELSAT and INMARSAT -- two special international treaty organizations -- COMSAT enjoys both treaty-based privileges and immunities and other indirect benefits not available to the other satellite competitors. Such advantages include immunity from antitrust and competition regulation, relief from Part 25 licensing procedures applicable to all other domestic satellite and separate system licensees, Presidential appointees on COMSAT's Board of Directors (*i.e.*, a direct communications link to the Administration), the ability to raise financing at rates not available to the private sector and relief from the regulatory and spectrum fees paid by all other satellite licensees.

COMSAT could also potentially leverage its signatory status to cross-subsidize domestic service offerings through international service offerings. The separate systems have long advocated stricter FCC scrutiny of COMSAT concerning structural separation issues (*e.g.*, separating competitive commercial functions from monopoly and signatory functions) and other regulatory safeguards. Such issues become increasingly important if COMSAT seeks to provide not only ancillary domestic services, but to enter the domestic marketplace as a special "treaty-exempt" competitor.

Orion Comments at 4-5.

^{6/} See, *e.g.*, Comments of Motorola Satellite Communications, Inc. (filed June 8, 1995) at 2-3; Comments of TRW, Inc. (filed June 8, 1995) at 2-3; and Orion Comments at 5.

Several other commenting parties echoed these concerns.^{7/} Moreover, the Commission itself recently acknowledged these special differentiating characteristics, and the competitive issues that attend them, in its Notice of Proposed Rule Making in *DISCO II*. See *DISCO II NPRM* at 22-25 ¶¶ 62-74. Indeed, the *DISCO II NPRM* provides perhaps the most potent evidence of the analytical difficulties that warrant the differential treatment the Commission has applied to COMSAT.

As a second line of attack, COMSAT advances the broadly-framed contention that excluding it from using Intelsat and Inmarsat to provide domestic service pending the outcome of the *DISCO II* proceeding conflicts with general U.S. policies which encourage and support the use of these IGOs. Petition at 8-11. This argument fails for two reasons. First, COMSAT's analysis relies entirely on general policies respecting these IGOs; it fails to consider the effect of the countervailing policies which the Commission must confront when developing the specific rules to implement the policies. Here, for instance, the Commission must develop rules which strike an appropriate balance between the U.S.'s statutory obligations to the IGOs and the equally important policy objective of protecting fair competition in the marketplace. Whatever the merits of COMSAT's contentions in this regard, it is clear they must be evaluated in the broader context. Accordingly, they are more appropriately addressed in the *DISCO II* rulemaking than in a reconsideration petition.

Second, as a practical matter, even assuming, *arguendo*, that COMSAT may experience some competitive disadvantage as a consequence of the *DISCO I Order*, it is not at all evident that COMSAT will suffer any lasting harm: The *DISCO II* proceeding has

^{7/} See Comments of AT&T Corp. at 13-14, 16; Comments of Columbia Communications Corporation at 6, 9-10; Comments of GE American Communications (filed June 8, 1995) at 12-13; Comments of PanAmSat (filed June 8, 1996) at 8

already been commenced; the comment cycle will close in August; and, thus, it is quite possible that COMSAT will have final rules governing its entry into the domestic market before the end of the year.

The Commission has correctly determined that COMSAT's provision of domestic service in the United States via Intelsat and Inmarsat implicates broader policy questions relative to the circumstances within which non-U.S.-licensed satellites will be permitted to serve the United States. The issues raised in COMSAT's Petition do nothing to cast doubt on the appropriateness or reasonability of that determination.

III. CONCLUSION

FOR THE FOREGOING REASONS, the Commission should dismiss COMSAT's Petition and deny its request for immediate interim relief.

Respectfully submitted,

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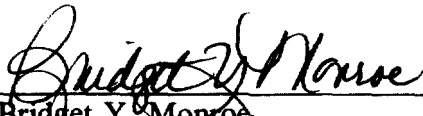
CERTIFICATE OF SERVICE

I, Bridget Y. Monroe, a secretary in the law firm of Verner, Liipfert, Bernhard, McPherson and Hand, Chartered, hereby certify that I have this date sent copies of the foregoing "Opposition of Orion Network Systems, Inc., to Petition for Partial Reconsideration and Immediate Interim Relief" to the following by First Class United States mail, postage prepaid:

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